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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No.

In the Matter

of

THE TUCSON GAS, ELECTRIC LIGHT AND POWER COMPANY,
A Corporation,

Petitioner,

vs.

CITY OF TUCSON, A Municipal Corporation,

Respondent.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

To the Honorable, the Supreme Court of the United States:

The petition of The Tucson Gas, Electric Light and Power Company for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review the decision of said court rendered the 26th day of December, 1945, respectfully shows:

STATEMENT

The decision sought to be reviewed is City of Tucson, a municipal corporation, appellant, vs. The Tucson Gas, Electric Light and Power Company, a corporation, appellee (R. Vol. II, p. 24), which reversed the judgment of

the United States District Court for the District of Arizona dismissing the complaint for condemnation of petitioner's utility properties on the ground that it failed to state a claim upon which relief could be granted. The District Court rendered no opinion, but simply entered its order upon which the judgment of dismissal was entered September 20, 1945 (R. Vol. I, p. 43).

The Facts

On February 2, 1944, the City of Tucson, a municipal corporation, respondent, filed its complaint to condemn all of petitioner's electric and gas properties, located in said City and environs, and extending into the three adjoining counties of Pinal, Cochise and Santa Cruz, Arizona, in the Superior Court of Pima County, Arizona, under the Arizona Municipal Revenue Bond Act of 1943 (R. Vol. I, p. 2), and thereafter, upon the ground of diversity of citizenship, the action was removed to the United States District Court for the District of Arizona (R. Vol. I, p. 30). A motion to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted was filed by petitioner, with amendments thereto, and after hearing, the District Court dismissed the action (R. Vol I, p. 42).

Appeal was taken to the United States Circuit Court of Appeals for the Ninth Circuit by the City on the general ground that the court erred in granting judgment dismissing plaintiff's complaint.

The complaint alleges (R. Vol. I, pp. 2-20):

The municipal character of respondent; that it is situate in Pima County, Arizona; that petitioner is a Colorado corporation transacting business in Pima County, Arizona, distributing electricity and gas to respondent and its in-

habitants and also to consumers located outside the City; that the utility property of petitioner is located within the City as well as outside thereof, in Pima, Pinal, Cochise and Santa Cruz Counties, all devoted to a public use, and that by virtue of respondent's Charter and the laws of Arizona, particularly sections 27-901 and 27-906, Arizona Code Annotated 1939 (being portions of the Eminent Domain Law of the State), respondent is authorized to condemn such property; that the property sought to be condemned is to be used by respondent in supplying electricity and gas to the City, its inhabitants, and also to consumers located outside the City; that the taking is for a public use and necessary for the operation and maintenance of a municipally owned electric utility and for supplying electricity and gas to the City, and others within the State; that the property is now devoted to a public use, and that the use to which respondent will apply property is a more necessary public use; that respondent proposes to finance the acquisition of said property under the provisions of the Municipal Revenue Bond Act of 1943 (being Sections 16-2601–16-2619 of the Arizona Code Annotated 1939, June 1945 Pocket Supplement, App. pp. 21-29; herein sometimes called "Revenue Bond Act"); that the Mayor and Council of said City have duly passed and adopted a resolution declaring said property necessary to respondent for the use as specified in the complaint, and directing the city attorney to institute an action in condemnation.

The respondent's Charter (Ch. IV, Sec. 1, Par. 25, App. page 21) provides that no public utility shall be acquired by the City without the assent of a majority of the qualified elector taxpayers voting on the question at a general or special election. The complaint contains no allegation that such election has been held. The Revenue Bond Act provides (Sec. 16-2604, App. page 22) that

questions of bond issues under the Act must be submitted to the real property taxpayers of the municipality and that no bonds shall be issued without the assent of the majority of such qualified electors voting at an election held for that purpose. The complaint contains no allegation that such an election to authorize bonds to finance the acquisition by the city has been held.

Questions Involved

The questions presented in this case are whether the City of Tucson, under the allegations of its complaint, can maintain an action to condemn petitioner's utility properties:

(a) In the absence of a prior election under its Charter, authorizing the acquisition;

(b) In the absence of an election authorizing the issuance of revenue bonds by respondent under the Revenue Bond Act with which to finance the acquisition of petitioner's properties;

(c) Where a substantial portion of the utility properties are located outside the municipality and now devoted to public service, and the acquisition and operation of such properties by the municipality would according to local law reduce all such outside service to private, contractual service in violation of Sec. 17 of Art. 2 of the Arizona Constitution (R. Vol. I, p. 41) prohibiting the taking of private property for private use;

(d) Where the value of the property is to be fixed as of the date of summons in the action, and the petitioner is obliged to make additions and extensions, when required to furnish service to the public, without receiving any consideration therefor;

(e) Where the proposed taking would violate the due process clause of the Constitution of the United States, Sec. 1 of Art. 14 (R. Vol. I, p. 42), and of the Arizona Constitution Sec. 4 of Art. 2 (R. Vol. I, p. 41), in that neither the Revenue Bond Act, upon which the action is founded, nor the law of eminent domain of Arizona, requires any showing of ability to compensate the owner for his property, or requires the property to be taken at all after judgment in favor of the condemner.

Reasons for Granting Writ

1. The Circuit Court of Appeals has decided two important questions of local law in a way probably in conflict with applicable decisions of the Supreme Court of the State of Arizona in holding:

(a) that the condemnation of petitioner's property was a matter of general and statewide concern as to which the Revenue Bond Act controlled and not the provisions of respondent's charter, which holding is in conflict with applicable Arizona decisions that such proprietary activity of a municipal corporation as the operation of utility property is a matter of local rather than general concern; and

(b) that the Revenue Bond Act sanctioned the condemnation of utility property outside the corporate limits of the City of Tucson, in conflict with the provisions of the Arizona Constitution that private property shall not be taken for a private use, and applicable Arizona decisions holding utility service by a municipality outside of its corporate limits to be a private use.

2. The Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable de-

cisions of this Court by failing to grant petitioner the protection of the due process of law provisions of the Federal and Arizona Constitutions and of the just compensation provision of the Arizona Constitution by holding:

(a) That petitioner, under the Revenue Bond Act as construed by the Circuit Court of Appeals, may be subjected to long and expensive litigation in the ascertainment of the value of its property, the title to its property put under a cloud and the property rendered practically unsaleable, without commitment to acquire the property or provision for compensating its owner; and

(b) That the Arizona eminent domain law fixing compensation and damages as of the date of the summons in the condemnation action and preventing any allowance for additions and betterments made thereafter under petitioner's obligation to render public service, affords just compensation to petitioner for the taking of its property.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari may issue out of, and under the seal of, this honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said court to certify and send to this Court, on a day designated for its review and determination, a full and complete transcript of the record and full proceedings in said United States Circuit Court of Appeals had in said proceeding entitled in that court "City of Tucson, A Municipal Corporation, Appellant, vs. The Tucson Gas, Electric Light and Power Company, A Corporation, Appellee, No. 11005"; and that said cause may be reviewed and determined by this Court as provided by law; that the said decision of the said United States Circuit Court of Appeals for the Ninth Circuit herein may be reversed,

and that your petitioner may have such other and further relief as may be just.

THE TUCSON GAS, ELECTRIC LIGHT AND POWER COMPANY

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Certificate of Counsel.

We, the undersigned attorneys for the petitioner herein do hereby certify that the foregoing petition is well founded, and not interposed for delay.

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